LEONG HUP HOLDINGS BERHAD

v.

TUAN HAJI ISHAK BIN ISMAIL & 9 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J
[ORIGINATING PETITION NO. D2-26-7-1995]
21 JUNE 1995

COMPANY LAW: *Petitioner's application under s. 181 of the Companies Act 1965 - Whether company's affairs are being conducted oppressively - Whether director's powers are being exercised oppressively - Whether acts of the company amount to unfair discrimination against one or more of the members of the company - Petitioner applying for injunction - Whether status quo should be maintained - Whether petitioner had a legitimate expectation to participate in the management of the company - Whether petitioner had a legitimate expectation to have representation on the board of the company - Whether injunction should be granted to restrain the removal of the petitioner's nominees from the board of the company.*

PRACTICE & PROCEDURE: *Respondents filing O. 18 r. 19(l) RHC 1980 applications - Respondents claiming that petitioner did not have a reasonable cause of action - Whether petitioner had shown a reasonable cause of action - Whether petition should be struck out.*

This case involved a boardroom tussle in the 10th respondent, KFC Holdings (Malaysia) Bhd. (the company), involving the nominees of the petitioner and the first to ninth respondents. The respondents sought the removal of the nominees of the petitioner from the board of directors of the company and the petitioner sought an injunction to restrain the respondents from so acting.

The petitioner claimed that the actions of the respondent were in contravention of the agreements entered into between the petitioner and the respondents and made an application under s. 181 of the Companies Act 1965 on the grounds of oppression against the minority shareholders.

The respondents filed an application under O. 18 r. 19(l) of the Rules of the High Court 1980 (RHC 1980) on the grounds that the petition disclosed no reasonable cause of action and sought an order that the petition be struck off.

Held:

[1] The question central to the facts pleaded in the petition is whether the petitioner had a legitimate expectation to participate in the management of the Company and to have representation on the board of directors. From the evidence adduced, namely the underlying agreements and the second agreement entered into between the parties, it was clear that the petitioner had such a legitimate expectation. In the circumstances, and applying the law as set out in *American Cyanamid v. Ethicon* and *Keet Gerald Francis Noel John v. Mohd. Noor @ Harun bin Abdullah & 2 Ors*., the *status quo* should be maintained and the petitioner should be entitled to an order in terms of its second summons in chambers until further order.

[2] On the respondents' argument that the petitioner's remedy was *via* the common law for breach of contract, by way of process of civil suit and not by recourse to the provisions of s. 181 of the Companies Act, it is true that when an agreement between parties embodied in

a written document is being construed, then, save for some limited exceptions provided in s. 92 of the Evidence Act 1950, extrinsic evidence is inadmissible. On the other hand, when the Court has to deal with a case which does not relate entirely to the meaning to be given to words contained in a written document but instead to consider whether the parties have behaved fairly and justly towards one another, the Court was not bound to shut its eyes to the parties conduct over a period that was material to the case in deciding whether one had behaved in a fair and just manner to the other.

[3] The Court was entitled to take into account all the circumstances of the case including events antecedent to the making of the document and even what was said in the course of negotiations leading up to the formalization of the written document and if the Court were to ignore such matters, then it would not be discharging its function in a case under s. 181 of the Companies Act 1965.

[4] The petition did show a case for investigation by trial, as between the first seven respondents, as to which of them owned or had control of the shares in question and more importantly the voting rights thereto relative to the control of the company. It seemed clear that upon a consideration of the pleaded facts and the law that there was a reasonable cause of action disclosed in the petition. The petitioner's claim in the petition cannot be said to be so hopeless as to merit the petition being struck out. In the circumstances the respondents' applications under O. 18 r. 19(l) RHC 1980 to strike out the petition had to be and was dismissed with costs to be taxed.

[Orders accordingly].

Cases referred to:

Tan Kim Seng v. Tan Kim San [1994] 3 CLJ 671 ***(refd)***
Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Berhad [1994] CLJ JT (26) p. 1 ***(refd)***
American Cyanamid v. Ethicon Ltd. [1975] AC 396 ***(foll)***
Keet Gerald Francis Noel John v. Mohd. Noor @ Harun bin Abdullah & 2 Ors. CLJ JT(2) p. 1 ***(foll)***
Ebrahimi v. Westbourne Galleries Ltd. and Others [1973] AC 360 ***(cons)***
Jaya Medical Consultants Sdn. Bhd. v. Island & Peninsular Bhd. & Ors. [1994] 1 MLJ 520 ***(refd)***
Re Posgate & Denby (Agencies) Ltd. [1987] BCLC 8 ***(refd)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***
Re Blue Arrow plc [1987] BCLC 585 ***(cons)***
Re Ringtower Holdings plc [1989] 5 BCC 82 ***(cons)***
Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd. [1994] 2 MLJ 789 ***(foll)***
Keng Huat Film Co. v. Makhanlall (Properties) [1984] 1 MLJ 243 ***(refd)***

Legislation referred to:

Companies Act 1948 (UK), ss. 210, 222
Companies Act, 1965, ss. 114(l), 128(l), 181(2)
Companies Act 1985 (UK), s. 459
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 18 r. 19(l), O. 29 r. 1(2C)

For the petitioner - M/s. Syarikat Kam Woon Wah
For the 1st respondent - M/s. Jeyaratnam & Chong
For the 2nd, 3rd & 5th respondent - M/s. Raja Eleena Siew And & Tan
For the 4th respondent - M/s. Cheong Kee Fong & Co.
For the 6th respondent - M/s. Teh & Assoc.
For the 7th respondent - M/s. Megat Najimuddin Leong & Co.
For the 8th & 9th respondent - M/s. Ghazi & Lim
For the 10th respondent - M/s. Ching Tan & Assoc.

JUDGMENT

Richard Talalla J:

This petition is brought under s. 181 of the Companies Act, 1965 (the Act). The following is what the petitioner (Leong Hup) claims therein. Leong Hup owns 30 million shares representing 29.65% of the paid up capital (the capital) of the 10th respondent company (the company). Lau Eng Guang (Kevin), Dato' Lau Tuang Nguang (Francis), Lau Chong Wang (the Lau brothers) are nominees of Leong Hup and were appointed as directors of the company to represent the interest of Leong Hup.

The 1st respondent (Ishak) is a director of the company as is the 2nd respondent (Ting) who is also the chief executive officer ("CEO") and managing director of the company and the 3rd respondent (Sarit) is the executive chairman of the company. Ishak, Ting & Sarit between themselves either directly or indirectly hold 32.66% of the capital. Ishak, Ting and Sarit were appointed directors of the company by reason of their control of the said shares. At all material times, the 4th respondent (Golden Plus) was a shareholder owning 28.48% of the capital. The 5th respondent (Pangkal Bahagia) is a private limited company and is wholly controlled by Ting and Sarit. The 6th and 7th respondents (Kenanga and TA Nominees respectively) are purported to hold not less than 10% of the capital. Golden Plus has disposed of its shareholding to Pangkal Bahagia and Kenanga but remains the registered shareholder of some of those shares. Ishak, Ting, Sarit, Golden Plus, Pangkal Bahagia, Kenanga and TA Nominees are hereinafter referred to as "the Ishak Faction".

The 8th respondent, Kentucky Fried Chicken International Holdings, Inc. (KFC International) is the owner of Kentucky Fried Chicken System (the system) and the KFC Trade Marks (the trade marks). KFC International was incorporated in the state of Delaware, United States of America and the 9th respondent (Lane) is the president of KFC International for the Asia-Pacific region.

The other directors making up a 9 member board of directors (the board) are Pierre Jean-Claude Moccand (Moccand); Tan Sri Dato' Dr. Ahmad Mustaffa bin Hj. Babjee and Datuk Abang Hj Zainie bin Abang Suhai and are not parties to this action. Moccand is a nominee of S.E.A. Trac (Holdings) Limited to represent its interest in the company and the last two directors are independent directors.

The company was and still is the exclusive franchise holder of the system and the trade marks collectively referred to as the KFC Franchise which is the basis for the operation of its quick service restaurants (KFC restaurants) in Malaysia under a franchise agreement (the franchise agreement) dated 1 September 1993. The use and exploitation of the KFC Franchise is the principal business of the company and its group of companies.

At all material times the principal activities and business of Leong Hup and its group of companies were that of poultry processing, poultry retail chain, breeder farms, hatchery and broiler farms. Between December 1992 and early March 1993, Leong Hup, entered into negotiations at the invitation of Ishak and Ting to purchase a stake in the company. Leong Hup was represented by Kevin and Francis in these negotiations. In order to induce Leong Hup to purchase that stake Ishak and Ting represented to Kevin and Francis, *inter alia*, that Leong Hup would co-operate with Ishak and Ting in managing the business of the company in view of the synergy between the respective businesses of the company and Leong Hup, that such co-operation could only be in the mutual interest and to the benefit of both parties, that upon Leong Hup taking up a 20% stake in the Company, Kevin and Francis would be appointed to the board, that Leong Hup would manage the operations of

the company which comprised the feedmill, poultry, breeder and broiler farms, hatchery, and processing plants (the upstream operations), that Ishak and Ting would be in charge of downstream operations of the company comprising the KFC restaurants and Ayamas outlets (collectively referred to as the downstream operations); and that to show that Ishak and Ting and the company were committed to co-operating with and in securing Leong Hup's position in the company, Ishak and Ting would ensure that the company take up a corresponding stake in Leong Hup with board representation. Acting on the faith of the said representations and induced thereby, Leong Hup agreed to take up a 20% stake in the company. Between 24 February 1993 and 1 March 1993, Leong Hup acquired 18,661,000 ordinary shares in the company for a total consideration of RM93,874,195.76. These shares constituted 20.27% of the then issued and paid-up capital of the company. By a management agreement (the management agreement) dated 12 March 1993, the company appointed Leong Hup to undertake and carry out the management of the upstream operations. Leong Hup in turn appointed the company to assist Leong Hup in the management of its Ayam Al retail outlets. On 28 June 1993, Kevin and Francis were duly appointed to the board. Francis was put in charge of the upstream operations. Prior to his appointment, Francis was already assisting the company in the upstream operations. The company took up a 10% stake of the then issued and paid-up share capital of Leong Hup. Leong Hup duly appointed Ting to the board of directors of Leong Hup to represent the interest of the company. The said representations and the agreements reached with Leong Hup are hereinafter referred to as the underlying agreements.

Leong Hup contends that by reason of the matters aforesaid and the underlying agreements, the Ishak Faction, in particular Ishak, Ting and Sarit, are precluded from acting or taking any steps to the prejudice and detriment of Leong Hup's interest in the company. Further, Leong Hup contends that by reason of aforesaid representations, Leong Hup is entitled to and has a legitimate expectation to be given representation on the board and the Ishak Faction, in particular Ishak, Ting and Sarit, are precluded from acting or taking any step to remove Leong Hup's representatives from the board.

At the 13th annual general meeting ("AGM") of the company held on 26 June 1993, the shareholders of the company passed a resolution authorising the directors from time to time to issue and allot ordinary shares from the unissued capital of the company provided that the number of shares to be issued should not exceed 10% of the issued capital for the time being of the company. At the 32nd meeting of the board ("32nd BM") held on 12 January 1994, it was proposed that the board approve the issue and allotment of 10% of the issued and paid up capital of the company to one Pelantar Matlamat (M) Sdn. Bhd. ("PMSB"). It was further proposed that a further 10% of the issued capital of the Company be issued and alloted to one Alambori Holdings Sdn. Bhd. ("AHSB"). Leong Hup objected to the proposals as the notices in respect of the proposals were only issued one day before the 32nd BM. Further, the issuance and allotment of the shares would be prejudicial and detrimental to Leong Hup's position in the company and in breach of the underlying agreements. Leong Hup's objections were not entertained and the proposals were approved by the board. Kevin and Francis voted against the proposals. Subsequent thereto, further meetings of the board were held whereby the approval for the issue and allotment of the shares to PMSB and AHSB was rescinded and a proposal that the shares be issued and re-allotted to others was approved. Again Leong Hup's nominees voted against the proposal.

In consequence thereof, Leong Hup commenced proceedings under s. 181 of the Companies Act, 1965 in Kuala Lumpur High Court Petition No. Dl-26-6-94 against *inter alios*, the directors of the company, including Ishak and Ting, Patrick Low Han Hing (Patrick) the then CEO and managing director, Khoo Cheng Gaik (Khoo) an executive director and Golden Plus.

In the said petition, Leong Hup sought a declaration that in passing the resolutions to issue and allot the shares of the company, the directors were exercising their powers in a manner oppressive to the members of the company including Leong Hup and/or in disregard of the interest of the members of the company including Leong Hup and/or that the directors acted or were threatening acts of the company which had unfairly discriminated or would so do against or would otherwise be prejudicial to the members of the company including Leong Hup. Leong Hup obtained in that petition an *ex-parte* injunction restraining the company from alloting or issuing the shares.

Kevin informed Ishak of the commencement of the proceedings and the injunction obtained by Leong Hup. Ishak requested Kevin to refrain from effecting service of the cause papers and sort out the matters with him. The request was acceded to as Leong Hup was more interested in ensuring that its investment was not jeopardised and that the company's business should not be disrupted. Kevin met with Ishak at the company's office on diverse dates. Arising out of these meetings it was agreed (the 2nd agreement) that Leong Hup withdraw the petition and discharge the injunction, that the issue and allotment of further shares by the company be rescinded, that the board be reconstituted so that no one party should be able to steal a march on the other and jeopardise the other's position in the company and that the underlying agreements in respect of the relationship between Leong Hup and the Ishak Faction still stand.

Pursuant to the 2nd agreement, Leong Hup duly withdrew the petition and discharged the injunction, the board was reconstituted with the Ishak Faction being represented by Ishak, Ting and Sarit and Leong Hup by the Lau brothers. Ting was appointed CEO and managing director, Sarit was appointed executive chairman whilst one of the Lau brothers namely Lau Chong Wang was appointed deputy chairman of the company. Kevin was appointed as executive director in the same capacity while Francis remained in the same capacity. Patrick and Khoo resigned from their respective posts. With the reconstitution of the board, the board came up with new limits and policies to ensure that no one party could make any financial commitments for the company without the joint approval of both parties and organisation was restructured with clear cut responsibilities of the respective executive directors and managing directors and provisions as to whom they were to report to. Leong Hup claims that the attempt of Ishak, Ting and Sarit to dilute Leong Hup's shareholding in the company and to marginalise Leong Hup's presence on the board was thus thwarted.

Leong Hup's representatives, Francis and Kevin were appointed to the board on 28 June 1993. On 19 August 1993, Francis was appointed as executive director of the company. He was put in charge of the upstream operations. On 30 June 1994, Francis was appointed as executive director of Ayamas Food Corporation Berhad ("AFCB"). On 1 September 1994, he was appointed as chief executive officer and managing director of AFCB. AFCB was on 3 November 1994 listed on the second board of the Kuala Lumpur Stock Exchange.

Through the experience of Francis with Leong Hup's operations, the upstream operations under his management improved and this success was duly noted by the board of directors of AFCB. The recommendation of Francis to convert the broiler farms which were incurring significant losses to breeder farms contributed significantly to the improved profit in the upstream operations. Francis also contributed in other respects which benefited the company and its group of companies. The company and its group of companies in fact adopted some of his proposals. For instance, his proposal in respect of contract farmers was accepted by the company.

After Kevin was appointed executive director of the company responsible for, *inter alia* group purchasing there was a significant improvement in the area of purchasing and capital investments. In short Francis and Kevin both contributed to the success of the company and ensured that Leong Hup's investment in the company was secured.

Nothwithstanding the fact that Leong Hup's participation in the business of the company was at the invitation of Ishak, Ting and Sarit and had contributed to improvement in its efficiency and productivity, it was not accepted in good faith. Instead it was interpreted by the Ishak Faction and principally Ting as interference in the management of the company and encroachment into the powers and authorities of the other directors of the company, in particular Ting. Francis and Kevin's presence on the board was viewed by some of the directors, in particular Ishak, Ting and Sarit, as an attempt to wrest control of the company from them and especially in respect of the lucrative downstream operations.

Leong Hup's presence was regarded as a threat to the position of Ishak, Ting and Sarit after Leong Hup acquired further shares in the company in the open market.

The system comprises the preparation, cooking and merchandising of specially selected chicken and other food products and sold under the trademark which is commonly known as Kentucky Fried Chicken. There are currently many KFC restaurants throughout Malaysia selling the stuff.

Ting has been associated with KFC International since the early 1980s and has a close relationship with Lane.

Under the franchise agreement KFC International granted a franchise to the company to use the system and the trademarks in connection with the operation of the quick service restaurants in Malaysia and Brunei (the business). The franchise agreement provided, *inter alia* that Ting should at all material times during the term of the franchise agreement, control, manage and direct the affairs and the operation of the business, that KFC International had entered into the franchise agreement in reliance on the character, dedication, experience and business skill and aptitude and financial condition of the company and the substantial shareholders set out in schedule C of the franchise agreement and on the basis that Ting possesses and maintains effective, personal control over the business, management, affairs and policies of the company, that the company or the substantial shareholders are not to sell or transfer any interest in the company or any outlet, the franchise agreement or the business without the prior written consent of Lane. Further, no change of control should occur whereby Ting loses or forfeits possession of the power to personally direct the business, management, affairs and policies of the company. The said substantial shareholders on whom KFC International so relied are Ishak, Ting, Sarit, Golden Plus and Grand Care Sdn. Bhd. which is a company controlled by Ishak, Ting and Sarit.

Having failed in their attempt in expelling or precluding Leong Hup from participating in the management of the company, Ishak, Ting and Sarit enlisted the assistance of KFC International, so Leong Hup claims.

In or about July 1994 Kevin and Ting met Lane in Brunei during the official opening of a KFC outlet there. At that meeting Lane allegedly told Kevin to get out of the company's office and leave the management of the company to Ting. Lane threatened to terminate the franchise agreement if Kevin failed to do so. Kevin denied interfering with Ting's day to day management and stated that they were both working for the interest and benefit of the company and its members. Lane also demanded a seat on the board to which Kevin replied that he would discuss with the board.

However after the said meeting in Brunei, Lane acting in cahoots with Ishak, Ting and Sarit by a letter dated 27 July 1994 written by his legal adviser and addressed to Ting, demanded a seat on the board and stipulated as his alternative one Arthur Rautio (Rautio).

By a letter of the same date and again addressed to Ting, Lane alleged that the company was in default of the franchise agreement and the shareholders' agreement in that Ishak and Ting had lost control of the company. Lane threatened to terminate the franchise agreement unless the company gave him a permanent seat on the board, evict all non-essential personnel (which meant Kevin and Francis) from the offices of the company and commence discussions between the company and KFC International for the latter to acquire shares in the company. Lane's letters were reviewed and discussed at the 38th meeting of the board held on 28 July 1994. At the said meeting, Ting denied having initiated or instigated Lane into writing the said letters. However Ishak, Ting and Sarit did not question Lane's stand but it was resolved *inter alia* that the company do seek the opinion of solicitors and that Ting and/or Kevin be authorised to take necessary action to safeguard the company's interest.

Ting, Kevin, Peter Kratz (Kratz), the alternate director to Moccand, and Tan Sri Dato Dr. Ahmad Mustaffa bin Hj. Babjee met Rautio. Kratz informed Rautio that Lane's demand would be discussed by the board and he also indicated that the board was not likely to approve the demand for a board seat for Lane. Rautio did not say much. He said that he would come back to them.

The board was briefed by Kratz of the meeting with Rautio at its 39th meeting held on 5 August 1994. An opinion by the said solicitors was brought up at the meeting. A copy of the opinion was sent to Lane by Ting. At this meeting, Lane's demand for board representation was extensively discussed. Thereafter it was resolved, that Lane be invited to attend board meetings as and when it was deemed necessary. Ting was invited to reply to Lane's letter but he declined. It was then resolved that Sarit as chairman reply to the letter. A letter was duly prepared on 5 August 1994 for Sarit's signature but Ting and Sarit refused to send out the said letter. Subsequent to his letter dated 27 July 1994 Lane invited Kevin to meet him in Hong Kong so that he could get to know Kevin. At the said meeting, Lane apologised to Kevin and said that the letter of 27 July 1994 was written by his lawyer. The issue of the appointment of Lane to the board quietened down. Then by a letter dated 30 November 1994 addressed to Sarit, Lane again expressed concern over the alleged loss of control of the company by the Ishak Faction. On the 6 December 1994 in an article in the issue of the Star newspaper Lane is reported to have accused the company of having breached the franchise agreement.

On 8 December 1994, an emergency meeting of the board was called to discuss a query from the KLSE. Although one of the directors, Moccand, expressed concern over Lane's action, the matter was not discussed further.

Leong Hup became concerned with the article in the Star. Leong Hup felt that the Ishak Faction had ignored the underlying agreements, and the 2nd agreement, which were the basis which induced Leong Hup into taking up a stake in the company and putting up a substantial capital outlay. It appeared to Leong Hup that the Ishak Faction with Lane were still trying to remove Leong Hup's nominees on the board. Leong Hup was concerned that the action by the Ishak Faction and Lane would jeopardise and affect its investment in that illegitimate pressure was being brought to bear on Leong Hup to oust its nominee directors from participating in the management of the company and to render Leong Hup a "locked-in" minority shareholder. It was obvious to Leong Hup that Ting was primarily responsible for the situation.

On or about 23 December 1994, Kevin requisitioned a board of directors' meeting to consider the removal of Ting as CEO and as managing director of the company.

In consequence on 27 December 1994 Kenanga and TA Nominees requisitioned under s. 114(l) of the Act an extraordinary general meeting of the company (the EGM) for the removal of the Lau brothers as directors of the company and the appointment of Lane as a director of the, company. Leong Hup also requisitioned an extraordinary general meeting to remove Ting as director of the company. Kevin then called for 2 meetings of the board on 28 December 1994 and 29 December 1994 respectively. The board meeting on 28 December 1994 was called off on that day itself. The directors of the company were however present at the company's office. Francis and Kevin met Ishak, Ting and Sarit. Also present at this meeting was Moccand. At the said meeting, the Ishak Faction proposed that the parties withraw their respective requisitions and proposed resolutions. Consequently, it was agreed by the parties that Leong Hup and the Ishak Faction withdraw their respective requisitions and proposed resolutions and that the *status quo* on the board of the company and the management structure be maintained. Francis and Kevin shook hands with Ishak, Ting and Sarit to confirm the agreement (the agreement of 28 December 1994). Kevin met Tan Sri Dato' Dr. Ahmad Mustaffa bin Hj. Babjee and Datuk Abang Zainie bin Abang Suhai who were waiting outside the meeting room and informed them that both parties had agreed to withdraw their respective requisitions and proposed resolutions. The 29 December 1994 meeting was called off.

Leong Hup did not proceed with its requisition. However, in breach of the agreement of 28 December 1994, the Ishak Faction through Kenanga and TA Nominees gave notice on 3 February 1995 that the EGM will be held on 18 February 1995 to remove the Lau brothers and appoint Lane as a director of the company.

On 27 January 1995, the 41st meeting of the board was held. At this meeting, Kevin told the board of directors that if the EGM was proceeded with, it would be an act of bad faith as the Ishak Faction and Leong Hup had agreed to withdraw their respective requisitions and that the directors representing substantial shareholders, that is the Ishak Faction, undertook to vote against all the resolutions.

On 10 February 1995 Ishak sent a memo to Kevin, copied to all board members, purportedly refuting Kevin's statement at the 41st board meeting. Leong Hup states that the memo was an afterthought by the Ishak Faction. In the memo Ishak denied *inter alia* that there was any agreement with Leong Hup with regard to the management of the company. Further he accused the Lau brothers of abusing their respective positions and the trust reposed in them. Leong Hup denies any abuse of trust or that the Lau brothers have abused their position as directors of the company. Ishak further accused Leong Hup of deliberate omissions and misrepresentations in respect of Leong Hup's vested interest in China and unauthorised use of KFC money. He further accused Francis of distortion of facts in helping the company save RM1.8 million. Leong Hup denies that it so omitted or misrepresented. Leong Hup does have some interest in China but it denies that it has used the company to further its interest or the company's money. Further these matters were all clarified in the 13th board meeting held on 29 December 1994, so the petition states. In the circumstances Leong Hup states that the said letter was an afterthought and unwarranted.

On 27 January 1995 at the meeting of the board held to discuss the requisition for the EGM by Kenanga and TA Nominees, Kevin questioned Ishak, Ting and Sarit with regard to their position in respect of the proposed resolutions. They did not respond to Kevin's question.

In 9 February 1995 issue of the Star, in a report on the EGM, Lane came out in open support of the Ishak Faction and has thrown his weight behind them. Leong Hup states that in openly supporting the Ishak Faction's resolutions to remove the Lau brothers, KFC International and Lane have meddled in the management of the affairs of the company. Implicit in their support of the Ishak Faction is the threat that if the Lau brothers are not removed and Lane is not appointed as a director, KFC International and Lane will terminate the franchise agreement as there were many parties interested in the KFC franchise.

Leong Hup further states that the Ishak Faction and KFC International are using the franchise agreement as an instrument of oppression to further their plan to get rid of Leong Hup's nominees on the board and to prevent Leong Hup from further participating in the management of the company, that Ishak, Ting and Sarit acting in collusion with Lane are conducting the affairs of the company in disregard of the interest of the members of the company including Leong Hup, that Ishak, Sarit, and Ting, as operator under the franchise agreement, hold the KFC franchise upon trust for the benefit of the Company, that in working in collusion with Lane and threatening to terminate the franchise agreement and withdrawing the KFC franchise from the company, the Ishak Faction and Lane have acted oppressively and in disregard of the interest of Leong Hup and the other members of the company and that the removal of Leong Hup's nominees will be in breach of the underlying agreements, the 2nd agreement and the agreement of 28 December 1994 and the proposed resolution will deprive Leong Hup of participation in the management of the company and is in disregard of the legitimate expectation of Leong Hup to have representation on the board. Leong Hup further contends that the notice of the requisition of the extraordinary general meeting dated 27 December 1994, the notice of the extraordinary general meeting and the notice of resolutions dated 3 February 1995 are invalid.

By reason of the matters aforesaid Leong Hup contends:

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one of more of the members including Leong Hup or in disregard of its or their interest as members of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members including Leong Hup,

and that this is a fit and proper case for this Court to make such order as its thinks fit under s. 181(2) of the Act with the view of bringing to end or remedying the matters complained of.

Leong Hup therefore prays *inter alia* for orders that the notice last referred to be cancelled as being invalid and of no effect, an order that in seeking the removal of Lau Chong Wang, Kevin and Francis as directors of the company and in attempting to appoint Timothy M Lane as director, the respondents except the company:

(i) are exercising their powers as directors of the company in a manner oppressive to the members of the company including Leong Hup and/or in disregard of the interest of the members of the company, including Leong Hup; and/or

(ii) did and/or are threatening acts of the company and/or resolutions of members are sought to be passed which have or will unfairly discriminate against or which is and/or will otherwise be prejudicial to the members of the company including Leong Hup,

an order that the first seven respondents are in breach of the underlying agreements, the 2nd agreement and the 28 December 1994 agreement, are precluded from removing Leong Hup's nominees from the board, an injunction to restrain Lane and KFC International from meddling in the management of the company and an injunction to restrain them from exercising the votes in the 33,075,000 ordinary shares in the company or any other shares controlled whether directly or indirectly by them in support of all the proposed resolutions at the extraordinary general to be held on 18 February 1995 and KFC International from terminating the franchise agreement, an order that the franchise agreement is held in trust for the benefit of the company, save as against the company damages and costs.

Leong Hup sought an interlocutory injunction. The following is what I recorded:

On 14 February 1995 Leong Hup applied by interlocutory summons in chambers *ex parte* and the next day obtained an injunction *inter alia* restraining the first seven respondents from exercising their voting rights in respect of some 33 million shares in the company directly or indirectly held by the first seven respondents in support of all the resolutions proposed to be moved at an extraordinary general meeting (the said meeting) of the company to be held on 18 February 1995. In so doing the petitioner purported to act under O. 29 r. 1 of the Rules of the High Court 1980. Subrule (2C) of r. 1 of the said Order reads as follows:

> Notwithstanding paragraph (2) of this rule, a Judge shall not grant an injunction on an *ex-parte* application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organisation, a club or a body of persons whatsoever named.

The said meeting was in writing requisitioned by Kenanga and TA Nominees who together held 17.8% of the shares in the company. The object of the said meeting as stated in the requisition was to remove 3 of the company's directors who, it is not in dispute, were supporters of the petitioner.

Apart from the requisitionists, Golden Plus held 29.4% of the shares in the company. Leong Hup held 18.9% of the shares of the company. It is an open secret that there is an ongoing dispute between Leong Hup and the directors sought to be removed on the one part and the respondents on the other part in regard to the running of the company with Leong Hup as stated above, holding 18.9% and the respondents being able to muster in support of their cause some 42.7% of the shareholding of the company.

Counsel for Ishak supported by Counsel for the other six respondents argued that the said injunction should not have been granted inasmuch as it offended against the provision of the said subrule and cited in his favour the decision of Dato' Abdul Malek J in *Tan Kim Seng v Tan Kim Lan* [1994] 3 CLJ 671. Counsel for the petitioner arguing to the contrary cited the judgment of Vincent Ng Kim Khoay J in *Sim Seoh Beng @ Sim Sai Beng & Anor. v Koperasi Tunas Muda Sungai Berhad* [1994] CLJ JT (26) page 1. This judgment went on appeal and the appeal was allowed but on another point which does not affect the judgment insofar as it is sought to be applied in this matter under consideration.

It is trite law that every case has to be decided on its own facts. A study of the two cited cases indicates that they were each decided on their own facts. As I see it now in this instance the terms of the injunction need to be studied as should the object of the meeting and then a decision made as to whether the effect of the injunction was to stop

the holding or progress of the meeting. Upon a reasonable construction I find that the effect was not to stop the meeting. As to the likelihood of the progress of the meeting being stopped I had in the light of the object of the meeting to anticipate what would transpire at the meeting. Quite clearly at the meeting steps would have been taken systematically to consider, and if thought fit, pass resolutions for removal of the directors concerned and appoint as director Lane, as stated in the requisition, that being the avowed object of the meeting, and in that regard it was imperative that Golden Plus, Kenanga and TA nominees, with their collective and not insignificant voting right, should be able to vote at the meeting failing which effectively shareholders holding 47.2% of the voting power would be prevented from raising their hands indicating aye or nay to the proposed resolutions. To my mind then that was tantamount to stopping the progress of the meeting. As I see it the words, "progress of the meeting", contained in the subrule means the advancement of the meeting towards achievement of its avowed object with no room for that advancement to be stopped by injunction given *ex parte* on any ground, be it contrary to law or the governing rules of the body, in this case the memorandum and articles of association of the company. Stopping can only be ordered after a hearing *inter partes*. Inasmuch as the injunction prohibited the voting I find it had the effect of stopping the progress of the meeting and accordingly it offended against the provisions of subrule (2C) and must now be set aside.

The injunction ordered *ex-parte* having then been set aside, the application under which it was made nonetheless remained on foot and having been served on the respondents could thereafter be given consideration on an *inter partes* basis. *Ex abundanti cautela* the petitioner had in the meanwhile filed a 2nd summons in chambers (petitioner's 2nd summons in chambers) claiming subtantially as in the 1st summons in chambers which they have now served on all respondents. There being no objection from any of the parties, I proceeded to hear both the plaintiff's summonses together with a number of summons in chambers filed respectively by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th respondents wherein the principal relief these respondents claim was an order that the petition be struck out under O. 18 r. 19(l)(a) on the ground that the petition does not disclose a reasonable cause of action (the O. 18 summonses).

Once again there being no objection from any of the parties, I proceeded to hear the O. 18 summonses at the same time. Before doing so and upon due consideration of all the material then before me I decided that as between the parties the *status quo* should be maintained. In so doing I applied the law set out in *American Cyanamid v Ethicon Ltd.* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & 2 Ors*. CLJ JT (2) 1995 p. 1.

I therefore made an order in terms of Leong Hup's 2nd summons in chambers until further order.

As I saw it the question central to the facts pleaded in the petition is whether the petitioner had a legitimate expectation to participate in the management of the company and to have representation on the board. As I understand it, the leading authority on legitimate expectation is the House of Lords case of *Ebrahimi v Westbourne Galleries and Others* [1973] AC 360. The facts were that *Ebrahimi* (E) and N were partners in a business from about 1945. In 1958 a private company was formed to take over the business. E and N were its first directors. Under the articles of association the company in general meeting had an express power to remove a director by ordinary resolution. Soon afterwards, N's son G was made a director, by virtue of their shareholdings N and G had a majority of votes in general meeting. The

company made good profits all of which were distributed as directors' remuneration. No dividends were ever paid. In 1969, after disagreement between E and N and G, an ordinary resolution was passed by the company in general meeting by the votes of N and G removing E as director. E petitioned for an order under s. 210 of the Companies Act 1948 that N and G should purchase his shares in the company or sell their shares to him on such terms as the Court should think fit, alternatively for an order under s. 222 (f) that the company be wound up. Plowman J refused to make an order under s. 210 but held that N and G had done the appellant a wrong in that it had been an abuse of power and a breach of the good faith which partners owed to each other to exclude one of them from all participation in the business on which they had embarked on the basis that all should participate in its management, and that, accordingly, E had made out a case for a winding-up order under s. 222 (f). The Court of Appeal allowed an appeal by the respondents, holding that in the case of a quasi-partnership company the exercise by a majority in general meeting of the power under the articles or s. 184 of the Act of 1948 to remove a director from office and consequently to exclude him from participation in the management and conduct of the business did not form a ground for holding that it was just and equitable that the company should be wound up unless it was shown that the power had not been exercised *bona fide* in the interests of the company or that the grounds for exercising the power were such that no reasonable man could think that the removal was in the interest of the company, and that, on the facts, E had failed to to show that his removal had not been justified and in the best interests of the company or that no man could have thought so. At page 379 Lord Wilberforce after reviewing a number of cases and expressing his opinion that those cases represent a sound and rational development of the law which he thought should be endorsed said:

> The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the Courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
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> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake, and go elsewhere.

Lord Wilberforce went on to justify at page 280 the application of the just and equitable clause to expulsion cases such as *Ebrahimi's* case was. He said that the question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. He went on to say that this situation he must normally accept, unless he undertakes the burden of proving fraud or *mala fides*. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved, said Lord Wilberforce.

In our jurisdiction in *Jaya Medical Consultants Sdn. Bhd. v. Island & Peninsular Bhd. & Ors.* [1994] 1 MLJ 520 at page 534 the petitioner pursuant to s. 181(l)(a) and (b) of the Act claimed *inter alia* legitimate expectation of getting a hospital and that expectation not having been fulfilled despite representations made by the second and third respondents. Siti Norma Yaakob J as she then was, at page 536 said that it is this concept of unfair discrimination or prejudice that enables the Court to take into consideration not only the rights of the members under the company's constitution but also their legitimate expectations arising from agreements and understanding of the members among themselves, and as authority referred to the case of *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8. In the *Postgate* case Hoffman J was dealing with the concept of unfair prejudice which forms the basis of the jurisdiction under s. 459 of the English Companies Act 1985 that enables the Court to take into account not only the rights of the members under the company's constitution but also their legitimate expectations arising from agreements and understandings of the members *inter se*. He said there was an analogy in the analysis of Lord Wilberforce of the concept of what is just and equitable in *Ebrahimi's* case, but in his judgment it was equally necessary for a shareholder who claims that it is unfair within the meaning of s. 459 for the board to exercise powers conferred by the articles to demonstrate some special circumstances which create legitimate expectation that the board would not do so and that in his judgment the matters relied on by the Counsel for the petitioner did not, singly or cumulatively, justify such an expectation. Each of them was expressly or impliedly contemplated by the articles which formed the basis on which the petitioner took his shares.

Thus the analysis abovestated of Lord Wilberforce was introduced by Hoffman J in *Posgate's* case to a case of unfair prejudice under s. 459 and in turn by Siti Norma J to a the case of unfair discrimination or prejudice under s. 181 of the Act, all relative to legitimate expectation. In the case of *Re Lo Siong Fong* [1994] 2 MLJ 72, V.C. George J, as he then was, was dealing with a petition brought under s. 218(l) of the Act for winding-up of a company on the grounds that it was just and equitable to do so and recognised the *Ebrahimi* situation and that equitable obligations could be allowed to override the rights and duties imposed by the memorandum and articles of association of a company and the laws pertaining to companies.

I did consider the case law cited on behalf of the respondents especially the cases relied on most namely *Re Blue Arrow plc* [1987] BCLC 585, and Re Ringtower [1989] 5 BCC 82. I did not however consider that Leong Hup should be deprived of a trial in order to establish facts on which it could attempt to distinguish the said case law.

The respondents prayed in aid the provisions of s. 128(l) of the Act which they claimed to override the provisions of s. 181. Section 128(l) provides that a public company may by ordinary resolution remove a director before the expiration of his period of office,

notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed. This question was not argued as intensely and as deeply as that on legitimate expectation. I did not consider it right that the petition should be struck out without a thoroughly researched consideration of the question.

The respondents were emphatic in their submission that Leong Hup's remedy if any was via the common law for breach of contract namely the management agreement, by way of process of civil suit and not by recourse to the provisions of the Act, in this instance a petition under s. 181. In this regard I refer to and respectfully follow the decision of Anuar J, as he then was, in *Kumugai Gumi Co. Ltd. v. Zenecon - Kumagai Sdn. Bhd.* [1994] 2 MLJ 789. In that case the learned Judge was hearing two petitions at the same time, one under s. 181 and the other under s. 218 based effectively on facts common to both petitions and at pages 811 and 812 stated that under the ordinary law of contract, when an agreement between parties embodied in a written document is being construed, then, save for some limited exceptions provided in s. 92 of the Evidence Act 1950, extrinsic evidence, such as negotiations prior to the making of the document, is inadmissible and then his Lordship referred to the case of *Keng Huat Film Co. v. Makhanlall (Properties)* [1984] 1 MLJ 243. On the other hand, said the Judge, when he has to deal with a case which does not relate entirely to the meaning to be given to words contained in a written document but instead to consider whether the parties have behaved fairly and justly towards one another - in a relationship that is very much like a fiduciary relationship, he the Judge, was not bound to shut his eyes to their conduct over a period that was material to the case, in deciding whether one had behaved in a fair or just manner to the other. The learned Judge said he was entitled, indeed obliged, to take into account all the circumstances of the case including events antecedent to the making of the document and even what was said in the course of negotiations leading up to the formalization of the written document and that if he were to ignore such matters, then he would not be discharging the function of a Judge hearing a case under ss. 218 or 181 of the Act. The learned Judge went on to say that if there was an undertaking given by the petitioner to the third respondent during the negotiations prior to the making of the shareholders' agreement in that case, or some understanding had been reached between the parties which formed the basis of the agreement or which led one or more of the respondents to enter into that agreement, then, a breach by the petitioner of such an undertaking or understanding, in the judgment of the learned Judge, had to be relevant in considering whether it was entitled to insist on the strict enforcement of the terms of the shareholders' agreement and it was for those reasons the Judge refused the petitioner's application to strike out parts of the respondent's affidavit.

The petition, to my mind, did show a case for investigation by trial, as between the first seven respondents, as to which of them owned or had control of the shares in question and more importantly the voting rights thereto relative to the control of the company.

It seemed clear to me upon consideration of the pleaded facts and the law as abovestated. that there was a reasonable cause of action disclosed in the petition. Accordingly, the respondents having each brought an application for an order that the petition be struck out on all the grounds stated in O. 18 r. 19(l) of the Rules of the High Court 1980 and as stated above it having been consented by all the parties that I do hear the four applications initially on one ground only namely that the petition disclosed no cause of action, I did so and

thereafter dismissed each of the said applications on the ground forthwith after giving my reasons which I recorded. This case seemed to attract much public attention as evidenced by wide newspaper coverage. Therefore the said reasons were given as simply and clearly as I could. This is what I said:

> The principal if not the sole concern of the Court is to administer justice according to the law. The law provides that generally disputes between citizens should be resolved by trial conducted in open Court for all to see. Justice must not only be done, it must be seen to be done. There is however a procedure in our Court whereby the case of a litigant can be struck out without there being a trial. That is a very serious thing because it has the effect of depriving a litigant of that litigant's ordinary right to have that litigant's case determined at a trial. For that reason the Court considers applications to strike out cases without trial with great care. The Court is now considering a number of applications by a number of respondents to this petition to strike out the petition on the grounds, *inter alia*, that the petition discloses no resonable cause of action, pursuant to the provisions of the Rules of the High Court 1980. I take the view that this is not an appropriate case for final disposal under those provisions. Order 18 r 19(l)(a) is reserved for cases that are plainly and obviously hopeless. Upon a consideration of applications under O. 18 r. 19(l)(a) I must assume all the allegations of fact in the petition to be true. A perusal of the petition discloses that there is indeed a reasonable cause of action disclosed therein against the first nine respondents principally and the tenth respondent consequentially.
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> The petitioner's claim to legitimate expectation cannot in my view be disposed of under O. 18 r. 19(l)(a). The cases on legitimate expectation cited by Counsel for the 1st respondent are complex and merit forensic consideration at a trial and not under O. 18 r. 19(l)(a). Likewise the provisions of s. 128(l) of the Companies Act 1965 must be considered in the light of a petition under s. 181 of the Act and the contents of the petition which, I repeat, at this stage of the proceedings I must accept as being true to fact. A trial is required to consider all the evidence in respect thereto including equitable consideration referred to by Counsel for the petitioner. The petition does disclose a reasonable cause of action against the 8th and 9th respondents for conspiracy with one or more of the other respondents excluding the 10th respondent to do the things complained of in the petition and falling under s. 181.
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> I consider the petition to be properly brought under s. 181 of the Act and I do not consider the petitioner is restricted to seeking redress in a civil suit under the common law. Insofar as I am considering the applications to the limited extent of O. 18 r. 19(l)(a) I am precluded from going into the evidence, affidavit or otherwise. Accordingly at this stage it is not for me to consider the relative strengths and weaknesses of the respective cases. Suffice it to say that the petitioner's claim in the petition cannot be said to be so hopeless as to merit the petition being struck out. Accordingly I disallow the applications for an order under O. 18 r. 19(l)(a).

Counsel for the respondents thereupon indicated to me that the respondents were not pursuing the applications on grounds (b), (c) and (d) of O. 18 r. 19(l). It was then that I dismissed the O. 18 applications with costs to be taxed, adding that I would give detailed grounds of decision in the event of an appeal against my order as required by their Lordships of the Court of Appeal.